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Case No. 09-1186

IN THE UNITED STATES SUPREME COURT

JOHN ERROL FERGUSON, ET AL.,
Petitioners,

v.

WALTER A. MCNEIL,
SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

[Capital Case]

Respondent would rephrase the questions as follows:

I, II. Whether this Court should grant certiorari to review the denial of habeas relief on the issue of ineffective assistance of penalty phase counsel in a case which presents no significant or important federal question and whose result is not fairly debatable?

III. Whether this Court should review the harmless error analysis undertaken by the Florida Supreme Court and the Eleventh Circuit Court of Appeals on allegations of Hitchcock v. Dugger, 481 U.S. 393 (1987), error, where it is clear the error(s), under any reasonable view of the facts, could not have affected the outcome of Petitioner's penalty phases?

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The opinion of the United States Court of Appeals for the Eleventh Circuit is reported at Ferguson v. Secretary for Dept. of Corrections, 580 F.3d 1183 (11th Cir. 2009).

JURISDICTION

This Court has jurisdiction pursuant to Title 28, United States Code, Section § 1254(1) to review the decision of the Eleventh Circuit Court of Appeals. However, Respondent submits that no question contained in the petition is worthy of this Court's consideration.

CONSTITUTIONAL PROVISIONS INVOLVED

Respondent accepts the Petitioner's statement of the constitutional provisions involved.

STATEMENT OF THE CASE AND FACTS

I) Preliminary Statement And Comment On Petitioner's Facts

Petitioner, John Errol Ferguson, is currently incarcerated on Florida's death row on eight counts of first degree murder. The proceedings herein arise from Ferguson's two separate capital murder trials, hereinafter referred to as the Carol City murders, with six victims, and the Hialeah murders, with two victims.

Petitioner's statement of facts and introduction are selective, in some instances misleading, and, contain the argument of counsel.[1] The Respondent therefore generally disagrees with both the facts and legal argument contained therein.

Petitioner selectively notes that several court appointed doctors had issued opinions that Ferguson was schizophrenic and incompetent. Indeed, the picture counsel paints is of a defendant who is chronically and seriously mentally ill. This is not an accurate portrait of the defendant. Petitioner ignores the fact that since 1978, the evidence is very much conflicting as to whether or not Petitioner suffers from any mental disorder aside from antisocial personality disorder and that a consensus has emerged among the reviewing courts, both state and federal, that Ferguson consciously malingers his mental condition.

At the time of Petitioner's Carol City trial, trial counsel challenged Ferguson's competency and planned to pursue an insanity defense. Ferguson was examined by four court appointed doctors, and after reviewing the reports and taking depositions, trial counsel decided that the evidence of his mental illness was weak, and, would open up serious rebuttal in the form of evidence that Ferguson was a highly dangerous psychopath who was consciously

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[1] This Court's Rule 15.2 admonishes counsel that they have an obligation to this Court to point out in the brief in opposition "any perceived misstatement of fact or law in the petition that bears on what issues properly would be before the Court if certiorari were granted."

feigning or malingering symptoms of mental illness. Ferguson v. State, (IV), 593 So. 2d 508, 510-11 (Fla. 1992). While Ferguson selectively cites four doctors in his statement of facts, who opined that Ferguson suffered from a serious mental illness prior to the 1978 trial, he conspicuously ignores the fact that two of these experts, Dr. Mutter, and Dr. Jaslow, subsequently found Ferguson competent to proceed and had come to doubt their original diagnosis of the Petitioner.[2] Dr. Mutter, although initially convinced that Ferguson had a legitimate mental illness, has since consistently found that Ferguson is malingering his mental condition. Most recently, in the federal competency hearing, Dr. Mutter testified "[t]his man is in a very difficult situation, and he is trying to prolong his life." (Competency Hearing, TR. 484).

In his statement of facts, defense counsel faults the State for releasing Petitioner despite the prescient opinions of select doctors that Petitioner suffered from serious mental illness and was extremely dangerous. However, after incarceration, treatment and observation, Ferguson was not deemed to be suffering from any serious mental illness. Petitioner's final discharge diagnosis from Florida State Hospital by Dr. Ogburn, prior to the instant murders, was that he had a personality disorder, antisocial type with a secondary diagnosis of drug abuse. (Hialeah Trial, T2, 1165).

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[2] As summarized in the sentencing order, Dr Mutter and Dr Jaslow [as well as Doctors Graff and Reichenberg], found that Petitioner was competent and either exaggerating or outright malingering (Resentencing Appeal, V1, 16-19).

Similarly, the State disputes Petitioner's characterization of the evidence presented during the post-conviction hearing relating to his childhood. Petitioner asserts that his childhood was one of physical abuse and severe privation, living in a house with no electricity or indoor plumbing, with wild animals running around. In reality, Ferguson's family was poor, but he was fed and the mother, according to her post-conviction testimony, was able to care for her children properly. (PCR-16, 2949). Ferguson's mother testified that she worked hard to provide for her family. Id. The only time Ferguson did not live in a home with modern conveniences such as indoor plumbing or electricity, was a brief period, no more than two or three months when they lived on a family friend's farm. (PCR-16, 2934, 2996).

While there was evidence that one of the mother's boyfriends was physically abusive to the mother, he was not abusive to the children. (PCR-16, 2958, 2973-74). There was no evidence that Petitioner was either physically or sexually abused. The mother would on occasion discipline the girls with an "ironing cord," or belt, but, Patricia Blue, Ferguson's older sister, testified that the mother would not strike Ferguson, apparently showing some favoritism toward him. (PCR-16, 3002). Evidence of Ferguson being physically struck in any manner was limited to testimony that his older sister disciplined all of the children when she was left in charge. However, Patricia Blue testified during the post-conviction hearing that such discipline could not be characterized as abusive. (PCR-16, 3013).

Finally, the State also disputes Petitioner's contention that he did not personally murder any of the victims in the Carol City case.[3] A specific finding was made below that he personally murdered one victim and attempted to kill another:

> [Petitioner] was a principal participant in the planning and execution of the robbery plans and all actions following the leaving of the scene of the crime which were designed to aid in avoiding detection. His participation constituted a major part of the total criminal activity involved. He was personally responsible for shooting two of the victims, killing one of them.

Ferguson v. State, (I), 417 So. 2d 639, 644-45 (Fla. 1982) (emphasis added).

II) Facts Surrounding Ferguson's Convictions And Resolution Of Legal Issues Relevant To This Petition

A) Petitioner's Eight Murder Convictions

(1) The Carol City Murders

The facts as found by the Florida Supreme Court are:

> On July 27, 1977, at approximately 8:15 p.m. the [Petitioner], posing as an employee of the power company, requested permission from Margaret Wooden to enter her Carol City

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[3] Petitioner was solely responsible for the murders of Brian Glenfeldt and Belinda Worley in Hialeah

home and check the electrical outlets. After gaining entry and checking several rooms, [Petitioner] drew a gun and tied and blindfolded Miss Wooden. [Petitioner] then let two men into the house who joined [Petitioner] in searching for drugs and money.

Some two hours later, the owner of the house, Livingston Stocker, and five friends returned home. [Petitioner], who identified himself to Miss Wooden as "Lucky," and his cohorts tied, blindfolded and searched the six men. All seven victims were then moved from the living room to the northeast bedroom.

Shortly thereafter, Miss Wooden's boyfriend, Miller, entered the house. He too was bound and searched. Then he and Miss Wooden were moved to her bedroom and the other six victims were returned to the living room.

At some point, one intruder's mask fell, revealing his face to the others. Miller and Wooden were kneeling on the floor with their upper bodies lying across the bed. Wooden heard shots from the living room then saw a pillow coming toward her head. She was shot. She saw Miller get shot then heard [Petitioner] run out of the room. She managed to get out and run to a neighbor's house to call the police.

When the police arrived they found six dead bodies. All had been shot in the back of the head with their hands tied behind their backs. One of the victims, Johnnie Hall, had

survived a shotgun blast to the back of his head. He testified to the methodical execution of the other men.

On September 15, 1977, [Petitioner] and three co-defendants were indicted for the offenses. Adolphus Archie, the "wheelman", was allowed to plead guilty to second degree murder and a twenty-year concurrent sentence on all counts in exchange for his testimony at trial. He testified that he'd dropped [Petitioner], Marvin Francois, and Beauford White in the Carol City area to "rip off" a drug house. He didn't see the actual shooting but later saw unfamiliar weapons and jewelry in Beauford's and Francois' possession.

Ferguson v. State, 417 So. 2d 639, 640-641 (Fla. 1982) (hereinafter Ferguson I).

(ii) The Hialeah Murders

The pertinent facts regarding the Hialeah murders of the seventeen year old victims, Brian Glenfeldt and Belinda Worley, are set forth in the Florida Supreme Court's direct appeal opinion:

The facts reveal that on January 8, 1978, the two victims were seated in an automobile and while seated therein a gunshot was fired through the window striking Brian Glenfeldt in the arm and chest area. A significant amount of bleeding followed and this victim's blood was found throughout many areas of the front of the automobile as well as on the clothing of Belinda Worley.

> Following the shooting, the female victim ran many hundreds of feet from the car in an attempt to allude the [Petitioner] and was finally overtaken in some rather dense overgrowth and trees. She was subjected to many physical abuses by [Petitioner], including but not limited to, sexual penetration of her vagina and anus. The discovery of embedded dirt in her fingers, on her torso both front and back and in many areas within her mouth and the findings of hemorrhaging around her vagina and anal cavity would indicate that she put up a significant struggle and suffered substantially during the perpetration of these indignities upon her body. Expert testimony indicates that she was a virgin at the time of the occurrence of this crime.
>
> The position of Belinda Worley's body and the location of the wounds on her head would indicate that she was in a kneeling position at the time she was shot through the top of the head. She was left in a partially nude condition in the area where the crime was committed, to be thereafter fed upon by insects and other predators. Physical evidence would substantiate that following the attack upon Belinda Worley, [Petitioner] went back to the car and shot Brian Glenfeldt through the head.

Ferguson v. State, 417 So. 2d 631, 636 (Fla. 1982) (hereinafter Ferguson II).

(B) Relevant State Post-Conviction Litigation

The resentencing and post-conviction facts are extensively discussed in the Florida Supreme Court opinions in this matter. See Ferguson v. State, 474 So. 2d 208 (Fla. 1982) [Ferguson III], (resentencing)]; Ferguson v. State, 593 So. 2d 508 (Fla. 1992) [Ferguson IV] (post-conviction); Ferguson v. Singletary, 632 So. 2d 53 (Fla. 1993) [Ferguson V] (state habeas); Ferguson v. State, 789 So. 2d 306 (Fla. 2001) [Ferguson VI] (successive motion for post-conviction relief, competency).

(i) Ineffective Assistance Of Counsel Claims

(a) Carol City

The Florida Supreme Court stated the following, in part, in rejecting the ineffective assistance of counsel claim:

> . . .Ferguson claims that his counsel in the Carol City trial was ineffective for failing to investigate and present mitigating evidence of Ferguson's mental impairment and difficult childhood. At the evidentiary hearing below, Ferguson's counsel testified that he reviewed four psychiatric reports of doctors appointed to examine Ferguson when counsel initially filed an insanity plea. Counsel also spoke to the doctors and took the deposition of the doctor who could provide the most favorable testimony. Although counsel did not obtain any reports prepared by doctors who had examined Ferguson in the past, he must have been aware of the fact that Ferguson's mental

problems dated back to 1971, since this information was revealed in the reports he did review.

Counsel also testified that he spoke to Ferguson's mother and to other family members. One of Ferguson's sisters was apparently reluctant to cooperate because she felt her job with the state attorney's office was jeopardized by her involvement in the case. Ferguson's mother was presented as a penalty phase witness. She testified that Ferguson was a good son, that he liked art and music, and that he helped support her when he was home. She also testified that Ferguson had mental problems and had been in a mental hospital.

In support of his 3.850 motion, Ferguson presented the testimony of several family members who had not testified at the original sentencing. This testimony indicated that Ferguson's childhood was difficult. His family was poor and moved around a lot, and his mother worked most of the time to support the children. His father was an alcoholic, who died when Ferguson was thirteen. The death of his father depressed Ferguson, and he began having run-ins with the law and problems in school. Ferguson's mother had many boyfriends, some of whom physically abused her in front of the children. Testimony was also presented that Ferguson was shot by a policeman; following this shooting Ferguson's behavior changed-he became paranoid and

hostile. [FN1]

> [FN1] We note that the admission of this evidence would have allowed the jury to hear the circumstances behind the shooting, which were not favorable to Ferguson.

The circuit judge found that counsel did conduct a reasonable investigation into Ferguson's family background and mental history and that his performance was not deficient. Although counsel did not exhaust all available sources of information by obtaining additional doctor's reports, hospital records, school records, or court records, this was not a case in which the attorney conducted only minimal investigation. Counsel interviewed family members and presented the testimony of Ferguson's mother. He was aware of Ferguson's mental problems, having reviewed reports prepared at his request and having interviewed the doctors who examined his client. The circuit judge concluded that counsel had made a tactical decision not to call the doctors as witnesses. Counsel had the information before him and could have reasonably decided that presenting mental illness testimony would have opened the door to extremely damaging State rebuttal. Several doctors indicated that they believed Ferguson was malingering, that he was a sociopath, not schizophrenic, and that he was a very dangerous person. Instead of opening the door

to this evidence, counsel informed the jury of Ferguson's mental condition through the testimony of Ferguson's mother, who discussed the fact that he had mental problems and had been in a mental hospital. This was a reasonable strategy in light of the negative aspects of the expert testimony. We affirm the circuit court's finding that Ferguson has failed to establish that the performance of his Carol City trial counsel was deficient.

(b) Hialeah

The Florida Supreme Court, in the same appeal, also rejected Petitioner's claim that his Hialeah counsel was ineffective, stating, in part:

Ferguson's claim that his Hialeah trial counsel was ineffective is similar, in that it is also based on counsel's alleged lack of investigation and presentation of mitigating evidence of Ferguson's mental illness and poor childhood. Ferguson also argues that his counsel was ineffective for failing to object during the prosecutor's closing argument and for making an inadequate closing argument himself.

In the penalty phase of the Hialeah trial, no mitigating evidence was presented by the defense. Ferguson asserts that counsel should have put on mental mitigating evidence. Unlike the Carol City case, Ferguson does not claim here that counsel failed to investigate

the extent of his mental illness. At the guilt phase of the trial, the defense claimed that Ferguson was insane, and numerous experts testified extensively as to Ferguson's mental problems. Counsel was fully aware that the standard for finding the statutory mitigating circumstances [FN2] to be applicable is lower than the M'Naghten insanity standard. Obviously if defense experts thought Ferguson met the higher standard for insanity they also believed he met the lower standard for statutory mitigation. In his penalty phase closing, counsel argued that the statutory mental mitigating factors applied to Ferguson, noting that even the State's experts agreed that Ferguson had a serious mental illness. Counsel testified at the hearing below that he and cocounsel considered putting the doctors on again and concluded that it would be cumulative. Counsel cannot be faulted for not recalling his experts at the penalty phase or parading still more experts in front of the jury.

> [FN2] § 921.141(6)(b) (the defendant was under the influence of extreme mental or emotional disturbance); (6)(f) (the defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired), Fla.Stat. (1977).

> We also find no deficiency in counsel's failure to present evidence of Ferguson's family background. Counsel was in touch with members of Ferguson's family. Ferguson's mother was called to the witness stand in the penalty phase. She was unable to testify when she became hysterical and nearly fainted, and counsel chose to remove her from the stand. Although counsel could have asked for a continuance to allow Ferguson's mother to compose herself, the decision to withdraw this witness was certainly reasonable in light of her emotional state. There was no connotation that she was removed because she could have nothing good to say about her son.

Ferguson, (IV) 593 So. 2d at 510 -511.

The Florida Supreme Court also found, that assuming that some deficiency could be discerned in counsel's conduct, Ferguson failed to carry his burden of establishing prejudice. The court stated:

> While we have concluded that counsel did not render ineffective assistance in either case, we also hold that Ferguson did not meet his burden under the second prong of the *Strickland* test. In other words, even if it could be said that counsel was ineffective, there is no reasonable probability that the result would have been different, in the absence of any deficient performance.

Ferguson (IV), 593 So. 2d at 512.

ii) State Court Treatment of Alleged Hitchcock Error

The Florida Supreme Court found no Hitchcock error in the Carol City case, stating, in part:

> In the Carol City trial, the judge instructed the jury as follows:
>
> > The aggravating circumstances which you may consider are limited to such of the following as may be established by the evidence . . . [listing the statutory aggravating factors]. The mitigating circumstances which you may consider, if established by the evidence, are these . . . [listing the statutory mitigating factors].
> >
> > The aggravating circumstances which you may consider are limited to those upon which I have just instructed you. *However, there is no such limitation upon the mitigating factors which you may consider.* (Emphasis added.)
>
> An instruction virtually identical to this instruction was given in *Adams v. State*, 543 So. 2d 1244 (Fla. 1989). This Court rejected Adams' *Hitchcock* claim, finding that "[i]n view of the instruction which was given, we are convinced that the jury was not misled concerning its ability to consider nonstatutory

> mitigating circumstances...." *Id.* at 1248. [Petitioner] argues that *Adams* is distinguishable because in that case the judge decided to give the instruction after the prosecutor argued in his closing that only statutory mitigation could be considered. Here, the instruction was given after previous instructions by the court itself had implied that only statutory mitigation could be considered. Although we agree that the motivation for giving the curative instruction may have been different in *Adams*, this does not change the effect of the instruction. As in *Adams*, the jury here was clearly instructed that they were not limited to consideration of the statutory mitigating circumstances, and there was no *Hitchcock* error.

Ferguson IV, 593 So. 2d at 512.

In the Hialeah case, the State conceded error, but argued it was harmless under the circumstances. The Florida Supreme Court agreed, stating:

> In the Hialeah case, the State has conceded that the instructions given were improper because they failed to adequately explain that the jury could consider nonstatutory mitigating evidence. Therefore, our consideration of Ferguson's argument that Hitchcock error entitles him to a new sentencing requires us to determine whether this error was harmless beyond a reasonable doubt.

The circuit court found the Hitchcock error to be harmless. The Hialeah jury had before it extensive evidence of Ferguson's mental problems from the expert testimony at the guilt phase, but did not find the evidence significant enough, when compared to the evidence in aggravation, to recommend a life sentence. The additional mitigating evidence presented at the 3.850 hearing was relatively insignificant. Although Ferguson's family was poor and somewhat unstable, his mother did her best to provide for the children, and there was no testimony that Ferguson himself was beaten or abused.

This mitigation is especially insignificant in light of the heinous nature of the killings in this case and the overwhelming aggravating factors. We discussed these murders in detail in our opinion on direct appeal.

* * *

The following aggravating circumstances were found: (1) Ferguson had committed three prior violent felonies; [FN3] (2) the murders were committed in the course of a robbery; (3) the murders were committed to avoid lawful arrest; (4) the murders were especially heinous, atrocious, or cruel; and (5) the murders were cold, calculated, and premeditated.

> [FN3] Assault with intent to commit rape; robbery; and resisting an officer with violence.
>
> We affirm the circuit court's finding that the Hitchcock error was harmless. Even if the nonstatutory mitigating evidence introduced at the 3.850 hearing had been presented and the jury had been specifically told it should consider nonstatutory mitigation in the weighing process, we are convinced beyond a reasonable doubt that the outcome would be the same.

Ferguson, 593 So.2d at 512-513.

(C) The Federal District Court's Competency Hearing

On July 9, 2004, the District Court entered an order setting an evidentiary hearing to determine whether Ferguson was competent to assist counsel with his habeas proceeding. The court conducted a five-day hearing which commenced the week of December 6, 2004. The court made detailed legal and factual findings, including, the following:

> From the testimony and evidence presented, the court finds that petitioner understands these proceedings and is competent to consult with his attorneys with a reasonable degree of rational understanding. The court finds that the assessments offered by Dr. Mutter and Dr. Suarez as to Mr.

> Ferguson's present mental state are credible and worthy of belief, i.e., petitioner is in remission and is malingering or exaggerating symptoms for the purpose of feigning mental illness. In making this finding, the court has fully considered the contrary assessments and opinions of petitioner's experts but ultimately has rejected them as neither credible nor worthy of belief. The court notes that multiple mental health examinations administered to Mr. Ferguson indicate that he is either significantly over-reporting or consciously exaggerating symptoms of chronic paranoid schizophrenia. . .

(Dkt.#107-Competency Order, 15). On the same day, the District Court entered an order denying all of the claims in his federal habeas petition.

D) The Eleventh Circuit

Petitioner appealed the denial of federal habeas relief to the Eleventh Circuit Court of Appeals. The State filed a notice of cross-appeal, challenging Petitioner's right to an indefinite stay of his habeas proceedings on the basis of his alleged incompetency.[4] The Eleventh Circuit affirmed the denial of habeas relief on August 26, 2009 and denied rehearing December 31, 2009. The mandate issued January 8, 2010.

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[4] The Eleventh Circuit declined to address the State's cross-appeal on the competency issue since the State prevailed below when the District Court found Ferguson was malingering and competent

REASONS FOR DENYING THE WRIT

I & II

THIS COURT SHOULD NOT GRANT CERTIORARI TO REVIEW THE DENIAL OF HABEAS RELIEF ON THE ISSUE OF INEFFECTIVE ASSISTANCE OF PENALTY PHASE COUNSEL IN A CASE WHICH DOES NOT CONFLICT WITH THIS COURT'S PRECEDENT, WHICH PRESENTS NO SIGNIFICANT OR IMPORTANT FEDERAL QUESTION AND WHOSE RESULT IS NOT FAIRLY DEBATABLE?

Petitioner argues that this Court should review the Eleventh Circuit's decision denying his writ of habeas corpus on the basis of ineffective assistance of penalty phase counsel. However, there is no basis for granting certiorari review of this case. There is no conflict between the Eleventh Circuit and this Court or any other circuit court regarding the denial of relief, and Petitioner has not established any reason for this Court to grant review of these fact-specific claims.

Petitioner does not assert that the claim presents an important question of constitutional law that this Court has yet to decide. Rather, Ferguson asserts a conflict with this Court's decisions in Porter v. McCollum, 130 S. Ct. 447 (2009), Wiggins v. Smith, 539 U.S. 510 (2003) and Rompilla v. Beard, 545 U.S. 374 (2005). However, neither Wiggins, Porter, Williams v. Taylor, 529 U.S. 362 (2000) nor Rompilla

change the law as set forth in Strickland v. Washington, 466 U.S. 668 (1984) on the appropriate standard to be applied upon review of ineffective assistance of counsel claims. See Wiggins, 539 U.S., at 522 (explaining that the Court "made no new law in resolving Williams' ineffectiveness claim," but instead applied the clearly established Strickland standard.); Williams v. Taylor, 529 U.S. 362, 390 (2000) (noting that the merits of Williams' claim "are squarely governed by our holding in Strickland."); Rompilla, 545 U.S., at 380, (recognizing that Rompilla's entitlement to federal habeas relief turns on resolution of his claim of ineffective assistance of counsel under Strickland.) Moreover, Ferguson's claim of conflict does not survive even a cursory comparison between these cases. Rather, his real complaint is in the manner in which the lower courts applied Strickland after a full post-conviction hearing in state court. Such assertions merely implicate an alleged "misapplication of a properly stated rule of law" Sup. Ct. R. 10. Accordingly, certiorari review should be denied.

Petitioner's primary claim of conflict emanates from this Court's recent decision in Porter v. McCollum, 130 S. Ct. 447, 453 (2009). However, Ferguson's case stands in stark contrast to Porter, where defense counsel failed to investigate, "uncover and present any evidence of Porter's mental health or mental impairment, his family background, or his military service." Porter applied well established law [Strickland] to a much different factual situation from that presented here.

Porter's counsel conducted an extremely limited investigation into Porter's background and entirely failed to present the most significant mitigation readily available to Porter, his extensive combat experience in Korea and its continuing psychological impact upon him. Porter on its facts was focused upon the unique nature of military service and, specifically, the weighty mitigation of a defendant who had seen considerable combat. Id. at 449-51, 455.

The mitigation evidence was much stronger in Porter and his crimes, [two murders] were much less aggravated than those in the instant case. The defendant's military service was critical to the holding in Porter. See Reed v. Secretary, Florida Dept. of Corrections, 593 F.3d 1217, 1249 (11th Cir. 2010) (noting that the defendant's extensive combat service was critical to the Supreme Court's decision in Porter). Moreover, in Porter there was no finding, as here, that the proposed mitigating mental health evidence [Carol City case] would have opened the door to damaging evidence that could be used by the State [antisocial personality disorder, prior crimes, malingering]. Id. at 454-55.

In contrast to Porter, Ferguson's counsel investigated his background, interviewed his mother and one or more sisters, and by challenging Ferguson's competency, had him examined by several mental health experts. Through depositions, he was aware of Ferguson's mental health history but also aware that the mental health experts were questioning the legitimacy of his mental health

symptoms and that four court appointed doctors outright concluded he was feigning mental illness in an attempt to extricate himself from serious legal jeopardy. Thus, unlike Porter, there was a strategic reason for counsel [Carol City] not to present mental health mitigation. Since Porter does not conflict with the Eleventh Circuit's decision in this case, review should be denied.

The Eleventh Circuit found it easier to dispose of Petitioner's claims on the prejudice prong, assuming *arguendo*, a deficiency had been established. This is a perfectly acceptable application of controlling precedent from this Court. See Strickland v. Washington, 466 U.S. 668, 697, 104 S. Ct. 2052, 2069 (1984) ("If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed.")

The Eleventh Circuit provided the following analysis of the prejudice prong in the Carol City case:

> Even assuming *arguendo* that Robbins's performance was deficient, Ferguson has not shown prejudice resulting from that deficient performance. The resentencing judge found five aggravating circumstances in this case: (1) Ferguson previously had been convicted of "three felonies involving the use of, or threat of, violence to some person [FN9];" (2) the murders were committed while Ferguson "was engaged in the commission of multiple robberies;" (3) the murders were committed "for the purpose of avoiding or preventing a

lawful arrest;" (4) the murders were "especially heinous, atrocious and cruel;" and (5) the crimes involved homicides "committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification." App. MM, Vol. 3 at 1-6. By comparison, the only possible mitigating circumstance identified by any of the courts assessing Ferguson's case was that there was some evidence to indicate that Ferguson might have been suffering severe mental disturbance at the time of murders and that he had an impaired capacity to appreciate the criminality of his conduct. All of these findings are entitled to a presumption of correctness, and the parties identify no basis for questioning this presumption. *See Hardwick*, 320 F.3d at 1158.

> [FN9] The felonies were a 1965 conviction for assault with intent to commit rape, a 1971 conviction for robbery, and a 1976 conviction for violent resistance to a police officer.
>
> [FN 10, 11, 12 omitted]

In our view, the aggravating circumstances far outweigh any mitigating factors, even taking into account the evidence that Robbins failed to uncover. The facts of this case are extreme, including multiple execution-style killings after a prolonged period in which the victims were bound and blindfolded. We agree with the resentencing court that "[t]he entire action of [Ferguson] and his co-conspirators reflects not only an absolute lack of concern for

> human life or dignity but also a barbaric cruelty." App. MM, Vol. 3 at 6. As a result, we do not believe it is reasonably probable that the evidence Ferguson cites would lead a jury to disregard such cruel circumstances and impose a different sentence. We thus find that Ferguson has not established prejudice from this ineffective assistance and therefore conclude that the district court correctly denied habeas relief with respect to this part of Ferguson's IAC claim.

Ferguson v. Secretary for Dept. of Corrections, 580 F.3d 1183, 1196-1197 (11th Cir. 2009) (emphasis added).

Further, it must be noted that each of these cases operated to add the considerable weight of multiple murders to the prior violent felony aggravator. See Wong v. Belmontes, 130 S. Ct. 383, 391 (2009) (noting that revelation of a defendant committing another murder is among the most powerful aggravating evidence). The Eleventh Circuit held as to the Hialeah case:

> As in the Carol City trial, even if we assume that Ferguson's Hialeah trial counsel was deficient during the penalty phase, it is not reasonably probable that the jury would have imposed a different sentence had they considered the missing mitigation evidence. On resentencing, the circuit court found six aggravating factors: (1) Ferguson previously had been convicted of four felonies involving the use or threat of violence [FN15]; (2) the murders occurred while Ferguson was

"engaged in the commission of rape and robbery;" (3) the murders were committed to avoid a lawful arrest; (4) the murders were "committed for pecuniary gain;" (5) the murders were "especially heinous, atrocious, and cruel;" and (6) Ferguson's crimes were committed "in a cold, calculated, and premeditated manner without any pretense of moral or legal justification." [FN16] App. MM, Vol. 3 at 13-16. The only potential mitigating factor the court identified was that Ferguson might have been suffering from extreme mental disturbance and been impaired in his ability to appreciate the criminality of his conduct.

We find that the aggravating factors significantly outweighed any mitigating evidence, including that which was not presented to the jury. The facts of the Hialeah murders are just as cruel and shocking as those of the Carol City killings. One of the victims, Worley, suffered extreme physical abuse, including being apparently raped, prior to being shot in the head and left partially nude by the roadside. The other victim, Glenfeld, was shot twice, both before and after Worley had been sexually assaulted, and murdered. Admittedly, at least two jurors decided not to impose the death penalty even in the face of such circumstances. [FN1] Nevertheless, the missing evidence likely would not have changed the outcome. Notably, most of the evidence regarding Ferguson's medical background already had been

presented during the guilt phase of the trial, so the jury considered that evidence in sentencing him to death. The missing evidence thus primarily involved Ferguson's family history. Although it is possible that evidence of Ferguson's mental history might have caused some jurors to recommend a sentence rather than death, we do not find that this was reasonably probable given the wealth of aggravating circumstances. See Parker v. Secretary for the Dep't of Corr., 331 F.3d 764, 783 & n.16 (11th Cir. 2003) (noting that the proper standard of review is "whether the jury's failure to hear the mitigating evidence undermines the confidence in its verdict, thus demonstrating a reasonable probability of a different result" rather than whether the result "would have been different absent the deficient performance") (alterations, quotation marks, and citation omitted). Accordingly, we find that Ferguson has not met the prejudice prong and conclude that the district court correctly denied Ferguson habeas relief with respect to his IAC claim regarding the penalty phase of the Hialeah trial. [FN18]

[FN15] These are the three felonies described supra n. 10, along with the Carol City murders.

[FN16] As in the Carol City case, the "cold, calculated, and premeditated" factor was addressed for the first time on resentencing, though the Florida Supreme Court found no error in the circuit court's reliance on it. The original

> trial court also found a fifth aggravating factor, that Ferguson committed the crimes while under a sentence of imprisonment; however, the Florida Supreme Court overturned this finding since he was not confined in prison at the time and was not supposed to be.
>
> [FN17] The actual number of jurors voting against the death penalty is unknown. At trial, the court began polling the jurors to confirm that the majority of the jury had voted to sentence Ferguson to death. Two of the jurors misunderstood and indicated that they personally had voted against a sentence of death; however, the court corrected this erroneous assumption before other jurors had an opportunity to signal their vote.
>
> [FN18 omitted]

Ferguson v. Secretary for Dept. of Corrections, 580 F.3d 1183, 1198-1199 (11th Cir. 2009).

Petitioner apparently contends the Eleventh Circuit did not sufficiently weigh the proposed mitigation evidence against the case in aggravation, and, instead, simply found the case highly aggravated. This is not an accurate characterization of the Eleventh Circuit's opinion. As reflected above, the court did weigh the proposed mitigation, but simply found it did not, in light of the overwhelming weight of aggravation, offer a reasonable probability of a different outcome; a reasonable application of

Strickland under the facts of this case. See Woodford v. Visciotti, 537 U.S. 19, 26, 123 S. Ct. 357, 361 (2002) (reversing the Ninth Circuit's prejudice finding based upon the failure to present the defendant's troubled and dysfunctional background and possible brain damage where the aggravating factors for the execution-style killing of one victim and attempted execution-style killing of another, "coupled with the aggravating evidence of prior offenses. . . .was devastating.")(citations omitted).

The Carol City case did not involve a single homicide, but the slaughter of six human beings and the attempted murder of two others. Petitioner's two Hialeah murders were devastatingly brutal. Petitioner's crimes are shocking, even by capital case standards. When coupled with Ferguson's violent prior offenses, the State's case in aggravation was simply overwhelming. The aggravating factors in both cases included two of the weightiest under Florida's capital sentencing scheme, CCP and HAC. Larkins v. State, 739 So. 2d 90, 92-95 (Fla. 1999) (The heinous, atrocious or cruel and the cold, calculated, and premeditated aggravating factors are considered two of the weightiest factors in the capital balancing equation). The Petitioner failed to demonstrate that the introduction of the conflicting psychiatric evidence, or family background evidence, would have explained or justified the defendant's

actions in committing these murders so as to warrant life sentences. Strickland, *supra*.[5]

A determination of whether the Eleventh Circuit's rejection of Petitioner's ineffective assistance claim on the lack of prejudice under Strickland is wholly dependent on the facts of the case and of significance to no one other than the parties to this litigation. As such, this Court should decline to exercise certiorari jurisdiction over this case. See Chevron U.S.A., Inc. v. Sheffield, 471 U.S. 1140 (1985); Rice v. Sioux City Memorial Park Cemetery, 349 U.S. 70 (1955); Layne & Bowler Corp. v. Western Well Works, 261 U.S. 387 (1923). Moreover, a review of the Eleventh Circuit's detailed opinion accompanying the denial of this claim establishes correct application of this Court's precedent.

In this case, the state courts and the district court below did not find that Ferguson had met his burden of establishing deficient performance under Strickland in either the Hialeah or Carol City cases. While the Eleventh Circuit acceptably found it easier to dispose of the ineffectiveness claims on the lack of prejudice, the State notes that it was not shown below that trial counsel in either case was deficient.

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[5] The State's already massive case in aggravation would be even more powerful on remand, where the State could introduce two additional murders in aggravation The jury would learn not only of Ferguson's Hialeah murder convictions but the horrible details of those offenses See United States v. Wasman, 700 F.2d 663, 668-669 (11th Cir 1983), Daugherty v State, 419 So. 2d 1067, 1069 (Fla 1982)

In the Carol City trial, counsel initially challenged Ferguson's competency, but, after receiving the doctors reports and taking depositions, realized a mental health defense would not be successful. The available mental health testimony would reveal damaging information about the defendant. This Court has repeatedly recognized that trial counsel may reasonably make a tactical decision not to present mitigating evidence where such evidence would "open the door" to negative information about the defendant. See Wong v. Belmontes, 130 S. Ct. 383, 388-389 (2009); Darden v. Wainwright, 477 U.S. 168, 186, 106 S. Ct. 2464, 2474 (1986); Burger v. Kemp, 483 U.S. 776, 792 ,107 S. Ct. 3114, 3124 (1987).

As for Ferguson's family background, in the Carol City case, Ferguson's trial attorney interviewed those closest to him, those who shared a home and who were likely to be motivated to help him, his mother and sisters. Ferguson's mother testified in the penalty phase, although admittedly, she provided somewhat limited testimony.

With regard to the Hialeah trial, counsel presented an insanity defense and fully investigated Petitioner's mental health background. Defense counsel chose not to recall his guilt phase experts to testify in the penalty phase. Mr. Hacker explained: The "jury and the Judge had already heard everything they were going to say and that to call them would be simply repeating themselves. So it was decided not to do it." (PCR-17, 3161). Such "[s]trategic choices made after thorough investigation

of the law and facts relevant to plausible options are virtually unchallengeable." Strickland, 466 U.S. at 690.

It is not ineffective assistance of counsel to rely on insanity evidence presented in the guilt phase to establish mental mitigation in the penalty phase. Bell v. Cone, 535 U.S. 685 (2002). "Because the defense's theory at the guilt phase was not guilty by reason of insanity, counsel was able to put before the jury extensive testimony about what he believed to be the most compelling mitigating evidence in the case." Bell, 535 U.S. at 699.

The mere incantation of Wiggins in Ferguson's petition does not suffice to show a conflict with that case. In assessing the prejudice prong of Strickland, this Court reweighed the evidence in aggravation against the totality of the mitigating evidence and determined the evidence of severe privation, physical and sexual abuse and rape, periods of homelessness and diminished mental capacities, comprised the "kind of troubled history we have declared relevant to assessing a defendant's moral culpability." Wiggins, 539 U.S. at 535. Noting that in Maryland [unlike Florida], the death recommendation must be unanimous, the High Court determined, "Had the jury been able to place petitioner's excruciating life history on the mitigating side of the scale, there is a reasonable probability that one juror would have struck a different balance." Id. at 537.

The mitigating evidence in Wiggins was far more compelling than the instant case and did not carry the risk of revealing damaging information about the defendant [uncharged crimes, malingering, psychopath]. Moreover, Petitioner was not subject to either sexual or physical abuse like the defendant in Wiggins who was shuttled from foster home to foster home and was left homeless. Ferguson's family history and background is unremarkable in comparison.[6]

While Petitioner's family was poor and the mother had been in an abusive relationship, the defendant was cared for, and, with the exception of three months spent on a farm, he did not live a life of severe privation and was not physically or sexually abused like the defendant in Wiggins. Perhaps, even more important, the defendant's role in the murder in Wiggins was uncertain and the crime was far less aggravated than the multiple murders committed by Petitioner in this case. Consequently, Wiggins does not conflict with the Eleventh Circuit's decision here.

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[6] As summarized by the Florida Supreme Court, in Ferguson v State, 593 So 2d 508, 510 (Fla 1992):

> . . .His family was poor and moved around a lot, and his mother worked most of the time to support the children His father was an alcoholic, who died when Ferguson was thirteen The death of his father depressed Ferguson, and he began having run-ins with the law and problems in school Ferguson's mother had many boyfriends, some of whom physically abused her in front of the children . .

Petitioner's citation to various Courts of Appeals' decisions does not establish any conflict with the Eleventh Circuit decision in this case. (Certiorari Petition at 26-32). There is no conflict of law among the courts of appeal, simply fact dependent applications of Strickland's prejudice prong. The cases cited by Petitioner are generally distinguishable by being less aggravated and/or more mitigated than the instant case. See e.g. Correll v. Ryan, 539 F.3d 938, 954-55 (9th Cir. 2008) (noting that this was a rare capital case in which the defendant had not "actually killed any of the victims" and trial counsel failed to present significant mitigating evidence, including brain damage, childhood abuse, parental abandonment at the age of 14, and addiction to drugs); Simmons v. Luebbers, 299 F.3d 929 (8th Cir. 2002) (less aggravated, with two murders, balanced against more significant mitigation, including low IQ, poverty, family dysfunction, and, in contrast to this case, much more severe evidence of parental abuse); Smith v. Mullen, 379 F.3d 919 (10th Cir. 2004) (heavily aggravated multiple murders which arose from a single apparently impulsive criminal episode where significant mitigating evidence of illiteracy, organic brain damage, possible retardation or, borderline retardation and troubled background was not presented).[7] Since there is no conflict on an important issue of law among the various courts of appeal, there is no basis for certiorari review.

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[7] Petitioner is of average intelligence. (Competency Hearing, TR. 675-76)

In conclusion, Petitioner has not demonstrated that the Eleventh Circuit's opinion decided an important question of federal law in a manner that conflicts with a decision of this Court. See, Sup. Ct. R. 10. The rejection of Petitioner's ineffective assistance of counsel claims was fully consistent with this Court's precedent and all applicable federal law. Consequently, this Court should decline to exercise its certiorari jurisdiction.

III

THIS COURT SHOULD DECLINE REVIEW OF THE HARMLESS ERROR ANALYSIS UNDERTAKEN BY THE FLORIDA SUPREME COURT AND THE ELEVENTH CIRCUIT COURT OF APPEALS ON ALLEGATIONS OF HITCHCOCK V. DUGGER, 481 U.S. 393 (1987), ERROR WHERE IT IS CLEAR THAT UNDER ANY REASONABLE VIEW OF THE FACTS, THE ERROR(S) COULD NOT HAVE AFFECTED THE OUTCOME OF PETITIONER'S PENALTY PHASES?

Petitioner asserts conflict with this Court's precedents, but, in reality he seeks only a fact based review of the harmless error review conducted by the lower state and federal courts. The Eleventh Circuit employed well established precedent, Brecht v. Abrahamson, 507 U.S. 619 (1993), to find any Hitchcock errors in the Hialeah and Carol City trials harmless. The correctness of the finding of harmlessness is a factual determination with no implications beyond the parties involved in this case, mandating the denial of certiorari review. See Bartlett v. Stephenson, 535 U.S. 1301, 1304 (2002) (issues with few, if any, ramifications beyond the presenting case do not satisfy any of the criteria for exercise of certiorari jurisdiction); United States v. Johnston, 268 U.S. 220, 227 (1925) ("We do not grant certiorari to review evidence and discuss specific facts."). Moreover, the sufficiency of the Eleventh Circuit's analysis is established by a review of that opinion.

Initially, the State notes that the Carol City jury instructions did not violate Hitchcock. The trial court in the Carol City case instructed the jury that it was "limited to . . . the following" listed factors in aggravation. (Carol City, V4, 1072-74). They were then instructed that they "may consider" the listed mitigating circumstances if established by the evidence. This was followed up with the court telling the jury again that it was limited to considering only the aggravating factors the court listed for them, but that there was "no such limitation upon the mitigating factors" that they could consider. Id. at 1075. There was nothing misleading about these instructions, and they comply with Hitchcock.

The Florida Supreme Court rejected Ferguson's claim of error below, stating: "[T]he jury here was clearly instructed that they were not limited to consideration of the statutory mitigating circumstances, and there was no Hitchcock error." Ferguson IV, 593 So. 2d at 512. The District Court agreed with the reasoning employed by the Florida Supreme Court, and, citing Quince v. Crosby, 360 F.3d 1259, 1267 (11th Cir. 2004), stated: "[A]fter reviewing the record and the parties' briefs, this court holds that the Florida Supreme Court's finding that the jury was not limited in its consideration of mitigating circumstances is fairly supported by the record. Thus, this court finds that Petitioner's Hitchcock claim does not provide a basis for relief as to the Carol City trial." (Order, pp. 36-37).

The Eleventh Circuit, however, given the potentially misleading or conflicting nature of the instructions, assumed a violation of Hitchcock. The court, applying well established law, found the error harmless under the "substantial" and "injurious" test of Brecht.

The Eleventh Circuit stated the following [in part], in rejecting this claim:

> . . .Since the error thus did not have a "substantial and injurious effect or influence in determining the jury's verdict," we conclude that it was harmless and that the district court correctly denied Ferguson habeas relief for this claim. *Sims*, 155 F.3d at 1315 (quotation marks and citations omitted).

Ferguson v. Secretary for Dept. of Corrections, 580 F 3d 1183, 1200-1203 (11th Cir. 2009).

As to the Hialeah trial, where error had been conceded by the State, the Eleventh Circuit also found the error harmless, stating, in part:

> At the Hialeah trial, the judge's first two instructions relating to mitigating circumstances were essentially the same as those in the Carol City trial. Unlike in the Carol City proceedings, though, he made no subsequent statement informing the jurors that they were not limited in the mitigating factors they could consider. The parties concede that these instructions constituted a *Hitchcock* error. We therefore must decide

whether this error was harmless under the *Brecht* standard.

The Florida Supreme Court rejected Ferguson's *Hitchcock* claim during the 3.850 proceedings. [FN27] It found that there had been a *Hitchcock* error in the Hialeah trial but concluded that the error was harmless "beyond a reasonable doubt." *Ferguson IV*, 593 So.2d at 513. The court described the additional mitigating evidence presented at the 3.850 hearing, which dealt Ferguson's family history, as "relatively insignificant." *Id.* at 512. It then went on to note that the mitigating evidence was "especially insignificant in light of the heinous nature of the killings in this case and the overwhelming aggravating factors." [FN28] *Id.*

FN27. The circuit court in those proceedings found that the *Hitchcock* error was harmless beyond a reasonable doubt since the trial court had told the jury to consider all of the evidence. The trial judge instructed the jury to "carefully weigh, sift and consider the evidence, and all of it, realizing that human life is at stake." App. LL, Vol. 6 at 1463-64.

FN28. It is unclear whether, in making this statement, the court was describing solely the mitigating evidence from the 3.850 hearing or all of the mitigating evidence in the case.

The district court agreed that the *Hitchcock* error "was harmless beyond a reasonable doubt." R4-108 at 37. In support of this conclusion, the court cited both the egregiousness of the aggravating circumstances and the fact that the jury already had discounted the non-statutory mental health evidence when it considered and rejected Ferguson's insanity defense. The court also agreed with the Florida Supreme Court that the outcome would have been the same even if the non-statutory mitigating evidence produced at the 3.850 hearing had been taken into account.

Ferguson notes that there was a wealth of evidence produced at trial regarding his psychological problems and that he exhibited bizarre behavior during the course of the trial. He asserts that the jury did not consider this evidence in imposing sentence because his counsel presented it only in terms of an insanity defense and did not connect it to a statutory mitigating factor. As previously noted, there is a reasonable argument that the jury did not take the mental health evidence into account because of the language of the jury instructions regarding mental duress and inability to appreciate the impact of one's actions. *See* n.24 *supra*. However, the judge's instruction to consider and weigh all of the evidence may mitigate the fact that counsel did not connect the evidence to a statutory mitigating factor.

> Even if we accept Ferguson's contention that the jury did not consider the evidence, we do not believe that the *Hitchcock* error would have changed the outcome. The evidence Ferguson cites here is essentially the same as that which he referenced with respect to the prejudice prong of his ineffective assistance claim. In fact, it may even be less since Ferguson has not identified a basis for us to take into account evidence that was not produced at trial. *See Smith*, 61 F.3d at 817. Since that evidence was insufficient to meet *Strickland*'s requirement that there be a "reasonable probability" of affecting the outcome, it likewise would not be enough to show the "substantial and injurious effect or influence" on the verdict required under *Brecht*. *Sims*, 155 F.3d at 1315 (quotation marks and citations omitted). Furthermore, as in the Carol City case, it is highly improbable that enough jurors would find that the multiple egregious aggravating factors were outweighed by this unconsidered mitigation evidence. We therefore conclude that the *Hitchcock* error in the Hialeah trial was harmless and that the district court properly denied Ferguson habeas relief with respect to this claim.

Ferguson v. Secretary for Dept. of Corrections, 580 F.3d 1183, 1203-1204 (11th Cir. 2009).

Petitioner has failed to demonstrate that the Eleventh Circuit's harmless error review was inconsistent with any decision from this Court. A fact intensive harmless error review of this case would have no impact beyond the interests of the parties to this case. See Rudolph v. United States, 370 U.S. 269 (1962) (recognizing that a certiorari petition predicated on reviewing facts of importance only "to the litigants themselves" was an inappropriate grounds to grant a writ). Furthermore, the sufficiency of the Eleventh Circuit's Brecht analysis and the Florida Supreme Court's more stringent harmless beyond a reasonable doubt review, are clearly established by a review of those courts' opinions. See Barclay v. Florida, 463 U.S. 939, 958 (1983) (wherein this Court recognized that the Florida Supreme Court does not apply its harmless error analysis in an automatic or mechanical fashion, but rather upholds death sentences on the basis of this analysis only when it actually finds that the error is harmless). Because no meaningful constitutional question has been presented, Respondent submits that this Court should deny review of the instant case.

CONCLUSION

Based on the foregoing, Respondent respectfully requests that this Court deny the petition for writ of certiorari.

Respectfully submitted,

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